too much, or at the least, that no judicially manageable standard has yet been identified. *Vieth v. Jubelirer*, 541 U.S. 267 (2004). Even if some such standard could be divined, Plan 1374C would more easily satisfy the standard than its immediate predecessors, including the 1991 congressional gerrymander.[2] Prior to the 2004 election, Democrats held a 17-15 advantage in the Texas congressional delegation. Yet in 2000, 56 percent of Texans voted for a Republican candidate to the U.S. House and all Texas statewide officials since then have been Republicans.[3] Preston, Bryan, *Red River Run*, NATIONAL REVIEW, May 27, 2003. The panel noted that the "emergence of Texas as a two-party-state" combined with Plan 1374C has

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[2] The 1991 gerrymander was based on the 1981 scheme, both of which were heavily influenced by partisan considerations and Congressman Martin Frost. The *Boston Globe* characterized the process as "partisan gerrymandering, with lines drawn to strengthen friends and oust enemies" and noted: "There have been outbreaks of hostility between blacks and browns as well as whites, and a black legislator from Dallas cut his finger severely last week when he broke a cocktail glass during an argument." Wilkie, Curtis, *Texas Plays High-Stakes Redistricting Game*, THE BOSTON GLOBE, May 27, 1981. Frost was cofounder of IMPAC 2000, a Democratic national organization that in 1991 pushed for gerrymanders in Texas and other states with the express purpose of locking in large Democrat congressional majorities. Barone, Michael, *Republican jujitsu against liberals*, U.S. NEWS & WORLD REPORT, April 22, 1991. Frost's 1991 map approved by the Democrat-controlled Texas House rejected the proposal by minority leaders and the few Republican legislators at the time to create a majority-minority district in Tarrant County. *See*, THE HOTLINE, August 21, 1991, noting Frost's plan was approved "despite the objections of some ethnic minorities that the plan favors protection of incumbents over the creation of solidly minority districts." Frost spoke candidly about the Democrats' success in accomplishing their partisan goals through the 1991 legislative redistricting: "To the extent that they [Republicans] made any gains, it was due to the federal judiciary." Wolf, Richard, *House Remapping Benefits Minorities, Women and GOP*, USA TODAY, June 8, 1992.

[3] The 56 percent figure likely underestimates the true statewide Republican voting strength for Congress in 2000, because of Democrats' incumbency advantage.

"caused the Texas delegation now to approximate the relative statewide voting strength of the two parties." *Henderson v. Perry*, 399 F.Supp.2d 756, 758 (E.D. Tex. 2005). If the best indicator of excessive partisanship is yielding outcomes that are unrepresentative of the electorate, it is the 1991 scheme engineered by former Congressman Martin Frost that fits the bill.[4] Now, the Appellants are asking this Court to saddle Texas with that undemocratic gerrymander for a full two decades.[5]

While the current Texas congressional delegation is somewhat more Republican than the state as a whole, this is a natural result of compact districting because the Democratic voters in Texas are highly concentrated in the urban centers and along the Mexican border. *See*, Bishop, Bill, *The Great Divide*, AUSTIN AMERICAN-STATESMAN, December 4, 2004. Although rural Texas was once home to many conservative Anglo Democrats, a well documented political realignment in Texas and other southern states occurred over the past several decades. *Id.* Thus, rather than causing a partisan shift, Plan 1374C is more properly viewed as accurately reflecting a shift that had already occurred.

Plan 1374C was motivated by compactness, keeping counties, cities, and school districts together where possible, avoiding the splitting of precincts, and adhering to nearly exact population parity among districts. J.S. App., at 30a. Far from grafting partisanship on to an objective existing map, the Legislature had a strong and legitimate remedial motivation—removing the partisan bias of the 1991 plan. The panel acknowledged that "the plan produced by this court

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[4] "The [Texas 1991 congressional redistricting] plan carefully constructs Democratic districts with incredibly convoluted lines and packs heavily Republican suburban areas into just a few districts." Barone, Michael, *The Almanac of American Politics 2004*, at 1448 (Nat'l Journal Group 2003).

[5] The 2000 and 2001 judicial modifications of the 1991 plan largely kept the same lines intact, resulting in the re-election of all incumbents.

perpetuated much of the 1991 Democratic Party gerrymander" that the court itself found unfairly allowed Democrats to control the majority of congressional seats while Republicans won 59 percent of the statewide vote. *Henderson v. Perry*, 399 F.Supp. at 764. The panel concluded "it is not clear that acting to *undo* a perceived disadvantage imposed previously by an opposing party is irrational in the sense that it admits of no salutary or constitutionally acceptable result." *Id.* at 767 (emphasis in original).

Article I, Section IV of the Constitution delegates congressional redistricting to state legislatures. This is one pillar of the Constitution's federalist system, which originally also trusted state legislators to select U.S. Senators. Imposing judge-made constraints on the extent to which partisan considerations may influence legislatures and the times when they may conduct redistricting would contravene this provision and the principles of federalism on which it is based.

Appellants' reliance on *Larios v. Cox*, 542 U.S. 947 (2004) is misplaced. Whether partisan redistricting is constitutionally or statutorily prohibited was not decided in *Larios*.[6] *Id.* at 949-950 (Stevens, J., concurring). Rather, *Larios* was a one person, one vote case where the district court found that population deviations of up to ten percent were systematically used to underpopulate Democratic-leaning rural and inner-city areas and overpopulate Republican suburban areas. It is undisputed that, under Plan 1374C, population deviations are no more than one person. Therefore, there is no cognizable one person, one vote constitutional issue.

This University Professors' claim that mid-decade redistricting using the last Census violates one person, one vote cannot be squared with the Constitution's requirement that

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[6] While partisanship was not at issue, the Georgia plan there was significantly more partisan than 1374C. For example, half of the Republicans in the Georgia Legislature were paired while less than a third of Texas Democrats in Congress lost their seats.

the decennial census be used for apportioning congressional representation. U.S. CONST. art. I, § 2, cl. 3; id. amend. XIV, § 2. By authorizing state legislatures to redraw districts based on the Census and giving Congress, not the courts, the power to regulate the exercise of that authority, the Constitution permits legislatures to engage in mid-decade redistricting. However, the Professors contend that updated population numbers from some source other than the last Census must be used. Aside from raising a serious constitutional question, some states' use of non-Census data would result in congressional districts with populations that diverge from the current 640,000 benchmark in states with at least two congressional districts, undermining the goals of equipopulousity and uniformity among the states.

If this Court goes beyond the one person, one vote standard to divine some necessarily subjective evaluation as to how much partisanship is too much, the Court will continually referee redistricting disputes from Congress to school boards. Suppose a city annexed an unincorporated suburb and then redrew its city council district lines? If the annexation benefited one party, would it be legal?

While determining after the fact whether a plan is excessively partisan is vexing, it is comparatively easy to modify the redistricting *process* to reduce partisan influence. Independent bipartisan or nonpartisan commissions have been successfully implemented as alternatives to partisan legislative redistricting in 12 states, as well as England and Australia. Elmendorf, Christopher S., *Representation Reinforcement Through Advisory Commissions: The Case of Election Law*, 80 N.Y.U. L.REV. 1366, November 2005. Texas State Senator Jeff Wentworth (R-San Antonio) has introduced legislation establishing such an independent commission that would be instructed to avoid favoring or

discriminating against any political party or group.[7] That these commissions have reined in creative line drawing to produce artificially uncompetitive districts, a benefit that is unlikely to accrue from judicial rulings that simply invalidate plans as excessively partisan, resulting in another slightly less partisan incumbent protection plan. If federal courts undertake the role of superintending whether redistricting outcomes are too partisan, the perceived need for reforms that create institutions better situated than the judiciary to check partisan redistricting could be reduced.

B. SECTION 2 OF THE VRA SHOULD BE INTERPRETED TO AVOID CONSTITUTIONAL QUESTIONS

Statutes should insofar as possible be construed to avoid raising constitutional issues. *DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This principle counsels against Appellants' proposed expansive interpretation of Section 2 to protect white Democratic incumbents in districts where minorities' votes form the margin of victory.

Under the Appellants' theory, congressional districts represented by white Democrats that become more Republican over time must be redrawn at every opportunity to offset the change in partisan identification by increasing the number of minorities. Ostensibly, this would be true even if one source of the change in partisan identification was that minorities in the district themselves became more Republican.

The Appellants' proposed outcome-based rule that would freeze in place so-called coalition districts creates unneeded tension with both the plain language of Section 2 and the Fourteenth and Fifteenth Amendments. If minorities are granted an endlessly renewable guarantee to their desired

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[7] Senator Wentworth presented his bill to create the commission for the first time in 1992 when a Democratic majority in the Texas Senate voted it down. Reeves, Stuart, *Wentworth Proposes Special Commission*, THE DAILY TEXAN, June 26, 2003.

electoral outcomes, white voters are by definition necessarily disfavored. Section 2 and the Fourteenth and Fifteenth Amendments safeguard the rights of all voters, including whites, by prohibiting the denial or abridgement of the right to vote on account of race or color. In *Shaw v. Reno*, 509 U.S. 630 (1993), the Court applied strict scrutiny in invalidating a North Carolina redistricting scheme that bolstered African-American voting power by drawing two bizarrely-shaped majority-minority districts. The Court held race may be used in redistricting only in a narrowly tailored fashion to further a compelling government interest. *Id.* at 632. Recognizing Appellants' coalition districts' claim would significantly increase the role of race in redistricting:

> The creation of coalition districts arguably forces jurisdictions to consider race more stringently than does the creation of majority-minority districts, because creating viable coalitions requires jurisdictions to engage in highly detailed analyses of racial bloc voting and racial crossover voting. As such, the use of coalition districts to achieve section 5 compliance will likely force a court to invoke strict scrutiny under *Miller v. Johnson*. 515 U.S. 900, 916 (1995) (noting that strict scrutiny must be invoked where the plaintiff can demonstrate that the legislature "subordinated traditional race-neutral districting principles"). Zibel, Daniel A., *Turning the Page on Section 5: The Implications of Multiracial Coalition Districts on Section 5 of the VRA*, 103 MICH. L. REV. 189, 214, n. 92.

With or without the bizarrely-shaped districts that were the manifestation of race-consciousness in *Shaw*, the injury to non-minority voters is even clearer here. Appellants' proposed rule would deny non-minority voters an equal opportunity to achieve their desired outcomes and force a state to maintain congressional districts even as they become increasingly unrepresentative of the state's voters.

In fact, the adoption of Appellants' theory that coalition districts must always be preserved as originally drawn would result in the violation of minorities' voting rights who vote contrary to the majority of minorities and live in districts where minorities' votes are decisive. For example, under Appellants' theory, minority Republicans, other than those who live in mostly white areas, would never be able to elect the candidate of their choice for any office, as their districts would be perpetually gerrymandered to keep a white Democrat in power so long as 51 percent of blacks provide a margin of victory for the white Democrat, even if a majority of Hispanics preferred a Hispanic Republican.

Furthermore, since there are no congressional findings that Section 2 requires the creation or preservation of minority-influence districts, there is no basis for invoking the enforcement powers of Congress pursuant to the Fourteenth and Fifteenth Amendments, and therefore no trump card to override the Constitution's principles of federalism. *See, Oregon v. Mitchell*, 400 U.S. 112, 130 (1970) (Congress had exceeded its power to regulate state elections, because "no legislative findings" that states were using the age requirements to discriminate based on race). While this case concerns federal elections, Section 2 applies to state and local elections, which militates against extending it and thereby creating a constitutional question concerning the balance of federal and state powers. The constitutional question is particularly weighty because, unlike Section 5, Section 2 is not confined to remedial circumstances and has no termination provision, resulting in endless federal supervision of state and local elections. In *City of Boerne v. Flores*, 521 U.S. 507 (1997), this Court, in striking down the Religious Freedom Restoration Act, elucidated the remedial parameters that circumscribe Congress' enforcement powers under the Fourteenth Amendment. *Id.* at 519. In *Lopez v. Monterey County*, 525 U.S. 266, 283-284 (1999), the Court expressly affirmed the *Flores*' holding limiting congressional enforce-

ment power under the Fourteenth and Fifteenth Amendments to remediation. While the *Lopez* Court upheld the constitutionality of Section 5, it emphasized that, because of its limited scope and bailout procedures, Section 5 "burdens state law only to the extent that that law affects voting in jurisdictions properly designated for coverage." *Id.*

Conversely, Section 2 is not congruent with remedial congressional enforcement power under the Fourteenth and Fifteenth Amendments, because it applies even to jurisdictions with no history of discrimination and has no bailout provision. Although we do not agree that the 1982 amendments to Section 2 completely eliminated the intent requirement[8], to the extent it has, Section 2 has become further unmoored from Congress' enforcement authority under the Fourteenth and Fifteenth Amendments, since claims under the Fourteenth amendment and the Fifteenth Amendment require proof of discriminatory intent. *See, Rogers v. Lodge*, 458

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[8] Representative Rodino, the House sponsor of the 1982 amendment, indicated that the amendment would not change the law with regard to proportional representation by creating an effects test. *See*, H.R. 3112, 97th Cong., 1st Sess., 127 CONG. REC. H1383 (daily ed. Apr. 7, 1981). In our view, for discriminatory results to be actionable under Section 2, they must be traced to ongoing purposeful discrimination, or at the very least, the present effects of recent purposeful discrimination. Accordingly, even after taking into account the 1982 changes, the Eleventh Circuit has explained that Section 2:

> explicitly retains racial bias as the gravamen of a . . . claim. The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color. The scope of the Voting Rights Act is indeed quite broad, but its rigorous protections, as the text of § 2 suggests, extend only to defeats experienced by voters 'on account of race or color,' not on account of some other racially neutral cause. *Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) (quoting *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 850 (5th Cir.1993) (en banc)).

U.S. 613, 618 (1982) (discussing intent requirement for Fourteenth Amendment and 42 U.S.C. § 1983 claim) and *City of Mobile v. Bolden*, 446 U.S. 55, 65 (1980) (plurality) (discussing intent requirement for Fifteenth Amendment claim). *See also, City of Rome v. United States*, 446 U.S. 156, 213 (1980) (Rehnquist, J., dissenting) (explaining that based on the remedial construction of the Fourteenth and Fifteenth Amendments, Congress' enforcement power over the states extends only insofar as necessary to right a wrong that amounts to a constitutional violation).

C. COURT SHOULD REDUCE, NOT EXPAND, THE USE OF RACE IN REDISTRICTING

We disagree with this Court's jurisprudence beginning with *Thornburg v. Gingles*, 478 U.S. 30 (1986) that has found in Section 2 a requirement for the creation and maintenance of majority-minority districts. The Constitution—and the overwhelming weight of this Court's other precedents in areas such as public contracting and employment and higher education—require that race be entirely excluded from consideration in redistricting, which could now be accomplished by specifying race-neutral parameters for lines drawn by a computer, ideally without reference to preserving existing majority-minority districts.[9] In *Johnson v. DeGrandy*, Justice Kennedy concluded:

> Given our decision in Shaw, there is good reason for state and federal officials with responsibilities related to

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[9] *See, Adarand Constructors v. Pena*, 515 U.S. 200 (1995) and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989) (striking down racial preferences in public contracting). *See, also, Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (invalidating use of racial preferences in public employment). Although we disagree with the Court's holding in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003) that diversity can, under very limited circumstances, be a compelling interest in higher education for the next 25 years, this rationale has no application to redistricting since the use of race tends to result in creating districts that look less like the general population and the alleged educational benefits do not apply to voting.

> redistricting, as well as reviewing courts, to recognize that explicit race-based districting embarks us on a most dangerous course. It is necessary to bear in mind that redistricting must comply with the overriding demands of the Equal Protection Clause. But no constitutional claims were brought here, and the Court's opinion does not address any constitutional issues. *Johnson v. DeGrandy*, 512 U.S. 997, 1031 (1994) (Kennedy, J., concurring).

While Congress intended that superficially race-neutral measures—whether a poll tax or a hypothetical Texas redistricting plan motivated entirely by race that used bizarre line-drawing to create no majority-minority districts—could violate Section 2, there is nothing in the plain language of Section 2 suggesting that the maximum number of a majority-minority districts must be created or preserved, particularly at the expense of race-neutral objectives. *Gingles* and its progeny have led to the brazen use of race to extract political benefits by packing minorities into bizarrely-drawn districts, an unintended consequence of mandating the use of race as a departure from traditional districting principles such as compactness. There is no evidence that minorities are better served by being more concentrated than Anglos.

A jurisprudence more consistent with the plain language of Section 2 and the Constitution would simply require that persons may not be classified or preferred on the basis of race. The Court endorsed a more flexible approach to Section 5 in which majority-minority districts would simply be one means of compliance in *Georgia v. Ashcroft*, 539 U.S. 461 (2003). By recognizing that minority-influence districts could substitute for majority-minority districts in some circumstances, the Court limited its role in the redistricting thicket and discouraged politicians from employing this Court's jurisprudence as a license for race-based packing.

Appellants never identify any legal basis for reconciling the *Georgia v. Ashcroft* holding that majority-minority dis-

tricts can be altered while still obtaining Section 5 preclearance with their claim that minority-influence districts can never be altered under Section 2. The Appellants are asking this Court to convert a voluntary means of compliance with Section 5 into a mandatory requirement under Section 2. Yet, unlike Section 5, Section 2 is not limited geographically or temporally in its application, and a jurisdiction can never extricate itself from federal oversight. Bybee, Keith J., MISTAKEN IDENTITY: THE SUPREME COURT AND THE POLITICS OF MINORITY REPRESENTATION 26 (1998). Such an extension of Section 2 would represent an unprecedented expansion in both the Court's role and the use of race in redistricting, creating unintended consequences. For example, incumbent protection of politicians elected in minority-influence districts would be required in redistricting, conferring an entitlement to hold office at the expense of drawing competitive general election districts.

D. FACTORS ENUMERATED BY CONGRESS AND THE COURT, HISTORICAL RECORD, AND RECENT ELECTION DATA WEIGH AGAINST FINDING VIOLATION OF SECTION 2

The "essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). This standard and the clear disclaimer of any right to proportional representation in Section 2 make clear that the proper legal touchstone is not the proportionality of results as measured by the number of minority or minority-preferred candidates elected, but the equality of opportunity to vote and run for office.

The Senate Judiciary Committee's report accompanying the 1982 legislation suggested factors to consider when determining if, the operation of an electoral device results in a

violation of Section 2.[10] In *Gingles*, the Court announced a three-prong test for establishing a Section 2 violation. First, the minority group must show it is geographically compact enough to constitute a majority in a single-member district. Second, the minority must show it is politically cohesive. Third, the white majority must vote sufficiently as a bloc to enable it to defeat the minority's preferred candidate. Prongs two and three of the *Gingles* test and the Committee Report factors combine to insert a dynamic element into a Section 2 claim that the Appellants ignore. To put it simply, racial attitudes and voting behavior in Texas in 2006 are not analogous Mississippi in 1965.

In 2004, Texas became a majority-minority state. *See, Texas Becomes Nation's Newest "Majority-Minority" State, Census Bureau Announces*, U.S. Census Bureau News Release, August 11, 2005. By 2030, the Bureau estimates that Texas will be majority Hispanic. Tilove, Jonathan, *Census estimates forecast rise of the Sun Belt Population*, BALTIMORE SUN, May 29, 2005. These demographic realities indicate that the "social conditions" cited in *Gingles* wherein a majority Anglo population wields power to disenfranchise minorities through unfair election procedures are simply not present in today's Texas.

In addition to the sheer power of demographic change recent election results are instructive. First, they are explicitly relevant to the Judiciary Committee factor concerning the election of minorities. Second, recent Texas election results are relevant to both the racial polarization factor stated by the Judiciary Committee and the third prong in the *Gingles* test.

Texas has elected several black statewide leaders who remain in office today: Railroad Commissioner Michael Williams, Supreme Court Chief Justice Wallace Jefferson, and Supreme Court Justice Dale Wainwright. In fact, of the

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[10] *See*, S.Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

two Hispanics and four blacks nominated to statewide offices by Republicans since 1994, all but one prevailed in the general election, with the winners receiving 63 to 85 percent of the Anglo vote, figures comparable to Anglo Republicans. Bullock, Charles S. and Ronald Keith Gaddie, *Assessment of Voting Rights Progress in Texas, The Project on Fair Representation*, American Enterprise Institute, January 6, 2006, pg. 15, available at http://www.aei.org/doclib/20060106_Vratexas.pdf. Moreover, their success in Republican primaries versus white opponents shows how receptive white Texan voters are to black candidates. In 2002, Wainwright defeated white district judge in the 2002 Republican primary. In the 2002 Republican primary, Jefferson prevailed over his white opponent, garnering 62 percent of the vote. In the 2000 Republican primary, Williams trounced his white opponent with a commanding 80 percent of the vote.

Texas has also elected numerous Hispanics to statewide office. In 2004, Hispanic Railroad Commissioner Victor Carillo won with some 63 percent of the vote over a white opponent in the Republican primary. In 2000, Supreme Court Justice Al Gonzales defeated a white opponent in the Republican primary with 58 percent of the vote. Tony Garza was elected Railroad Commissioner, defeating a white former Congressman in the 1998 Republican Primary. In 1994, Hispanic Democrat Attorney General Dan Morales was re-elected statewide with 53.7 percent of the vote, outperforming numerous white Democratic incumbents. In that same election, Hispanic Democrat Texas Supreme Court Justice Raul Gonzalez was re-elected with an overwhelming 81.3 percent of the vote, suggesting he was the candidate of choice for all racial groups.

Thousands of blacks and Hispanics serve in the Legislature and local offices, including recent Mayors of the state's four largest cities: Houston, San Antonio, Dallas, and Austin. Professors Charles Bullock and Ronald Gaddie note, "In 1996, Texas boasted almost 1,700 Latinos in public office

and by 2003 that number had swelled to almost 2,000, one of whom held a statewide post." *Bullock and Gaddie* at p. 9. This is twice the number of Hispanic elected officials in California, even though Texas has a substantially smaller population. *Id.* at 9. Currently, 27 members of the 150-member House of Representatives are Hispanic and 14 are black. *Bullock and Gaddie* at p. 27, Table 7. Of the 31 members of the State Senate, eight are either black or Hispanic. *Id.*

Indeed, the success of Dallas Mayor Ron Kirk shows, along with Morales and Gonzalez, that it is not just Republican minority elected officials who have performed well among white voters. In 1999, 74 percent of Dallas voters—ostensibly a majority of blacks and whites—voted to re-elect Mayor Ron Kirk over a white opponent. Jalonick, Mary Clare, *Accentuate the positive*, CAMPAIGNS & ELECTIONS, May 1, 2002. However, the lack of black and Hispanic voting cohesion was demonstrated when Kirk was first elected in 1997 with 97 percent of the black vote, 42 percent of the white vote, and only 14 percent of the Hispanic vote. Shepard, Scott, *Disharmony in Diversity: Political Alliances Between Hispanics and African-Americans Are Rare in Dallas*, ATLANTA JOURNAL-CONSTITUTION, August 31, 1997.

The lack of black and Hispanic voting cohesion was also evident in the 1998 Democratic primary for Agriculture Commissioner between Anglo Pete Patterson and Hispanic Ernesto DeLeon. In Dallas County, DeLeon is estimated to have received 80.8 percent of the Hispanic vote but only 23.4 percent of the black vote and 36.3 percent of the Anglo vote. *Bullock and Gaddie* at p. 33, Table 10. Similarly, in Tarrant County, DeLeon garnered approximately 77.8 percent of the Hispanic vote but only 17.8 percent of the black vote and 33.3 percent of the Anglo vote. Also, in the 1998 Democratic primary for Attorney General, black candidate Morris Overstreet, facing two Anglos, received roughly 64.1 percent of the black vote in Dallas County, but less than 5 percent of the Hispanic and Anglo votes. In Tarrant County, Overstreet

performed similarly, garnering 73.7 percent of the black vote, but less than 1 percent of Hispanic and Anglo votes.

The lack of cohesion among Texas blacks and Hispanics has also been apparent in Houston. In 1997, Rob Mosbacher, a white Republican, received 54 percent of the Hispanic vote in his unsuccessful campaign against black Democrat Lee Brown, who won nearly all the black vote. Rodriguez, Lori, *Group hopes to mobilize Houston's Hispanics to vote*, HOUSTON CHRONICLE, September 23, 2001. In 2001, Brown won re-election over Republican Hispanic challenger Orlando Sanchez by 51 to 49 percent. Sanchez won 72 percent of the Hispanic vote and 90 percent of the Republican vote while Brown collected 93 percent of the black vote. Hamilton, Kendra, *A tale of three cities*, BLACK ISSUES HIGHER EDUC., Vol. 19, Issue 6, September 26, 2002; Williams, John, *Poll: White widening gap over Sanchez*, HOUSTON CHRONICLE, December 5, 2003.

These results show that blacks and Hispanics are not a cohesive voting bloc, and that whites are often more likely than Hispanics to join with blacks to elect a black candidate. Also, Hispanics themselves are not a cohesive voting bloc. In Houston, where Hispanics have supplanted Anglos as the largest ethnic group, the proportion of non-Mexican Hispanics jumped from 20.4 percent in 1990 to nearly 28 percent in 2000. Rodriguez, Lori, *Shift Seen in Houston's Hispanic Growth*, HOUSTON CHRONICLE, August 17, 2003. In Austin, the percentage increased from 12.7 to 23.3 while in Dallas it grew from 12 to 17. *Id.* Texas state demographer Steve Murdock notes, "What's significant is that Hispanics have been in the 90 percent of Mexican origin for decades, and now we're seeing an abrupt shift and increasing diversification. These newcomers may have much more in common with other new immigrants than with Hispanics who have been here for generations." *Id.* One indication of the divergent political traditions among various Latino groups is that fourteen percent more Cubans identify themselves as

Republicans than as Democrats. *National Annenberg Election Survey of 2000*, available at http://www.annenberg publicpolicycenter.org. Hispanics' socioeconomic status also has a profound effect on their voting preferences. Gallup polls show that Hispanics with household incomes over $50,000 are twice as likely to be Republicans as other Hispanics. Kasindorf, Martin, *Parties target Hispanics in 4 battleground states*, USA TODAY, October 26, 2004.

In addition to electing blacks and Hispanics, Texas minorities have frequently elected their white candidates of choice on a local level, and on the state level prior to the Republican dominance that began in the middle of the 1990's. Even after this realignment, Hispanics may still have elected a candidate of their choice. The Texas Poil just before the November 1998 election found Governor Bush led his Democrat opponent 49 to 41 percent among Hispanics. Ratcliffe, R.G., *Texas Poll continues to predict major victory for Bush*, LAREDO MORNING NEWS, November 1, 1998. The percent of Southern Hispanics who voted for President Bush increased from 41 percent in 2000 to 55 percent in 2004. Moscoso, Eunice, *Bush Makes Gains With Hispanic Men; Hispanic Southerners*, Cox News Service, December 22, 2004.

Many of the factors cited by the Judiciary Committee are nonexistent in today's Texas. For example, in recent Texas elections, the subtle racial appeals referenced by the Committee have been absent. Other factors cited by the Committee are similarly inapplicable to today's Texas, including unusually large election districts, majority-vote requirements, prohibitions against bullet voting, and the exclusion of members of the minority group from candidate slating processes. While there are racial disparities in education, employment, and health, they do not prevent minorities from participating effectively in the political process.

Given the role of history cited *Gingles* and the Judiciary Committee, the Court should take judicial notice that Hispan-

ics have never been systematically denied the right to vote in Texas. In fact, three of the signers of the Texas Declaration of Independence were of Mexican descent. *See, HANDBOOK OF TEXAS ONLINE, S.V. "MEXICAN TEXAS"*, available at www.tsha.utexas.edu/ (visited January 15, 2006). Texas Hispanics, unlike blacks, have not been subject to segregation or Jim Crow laws. Chavez, Linda, OUT OF THE BARRIO, ch. 2 (1991). "There is no history either of *de jure* discrimination against Mexican Americans in education at any level in Texas or of *de facto* discrimination against Mexican Americans by the [University of Texas] law school." *Hopwood v. Texas*, 78 F.3d 932, 955, n. 50 (5th Cir. 1996). Former Attorney General Dan Morales observed, "There is very, very close to unanimity between the majority culture and political tradition and the Hispanic community." *Perspective*, ALBANY TIMES-UNION, September 15, 1991.

State-sponsored discrimination against blacks in Texas has long been consigned to the dustbin of history. Because black voter participation was sufficiently high in Texas, the trigger mechanism in Section 4 of the VRA of 1965 did not implicate the state. Blum, Edward & Abigail Thernstrom, *Executive Summary of the Bullock-Gaddie Assessment of Voting Rights Progress in Texas*, The Project on Fair Representation, American Enterprise Institute, January 6, 2006, pg. 8, available at http://www.aei.org/doclib/20060106_Vratexas.pdf. In fact, in the five most recent Texas elections, African-Americans have turned out to vote at higher rates than Anglos. *Bullock and Gaddie* at p. 8. Black turnout in the 2004 election was 55.8 percent in Texas compared with 50.6 percent for whites. *Id.* at 22. Similarly, from 1992 to 2004, the share of the Texas registrants who have Spanish surnames has increased by more than 40 percent so that the proportion of registered voters with a Spanish surname is only slightly less than the share of the state's citizen voting age population that is Hispanic. *Id.* at 19. The rise of Hispanic political participation in Texas was illustrated when the two Democratic

gubernatorial candidates in 2002—Tony Sanchez and Dan Morales—conducted a primary debate that was partly in Spanish. Axtman, Kris, *Qué es esto: ¿A Texas debate in Spanish?*, CHRISTIAN SCIENCE MONITOR, March 1, 2002.

Ron Kirk candidly observed in during his 2002 Senate campaign, "Frankly, the challenge in Texas is not to get people to vote for a black, but to get them to vote for a Democrat." Kiker, Douglas, *Just the Ticket in Texas?*, CBS News, June 27, 2002. Statistics prove Kirk's point:

> Candidate race is not a factor in the decline of support for Democratic candidates in the 66 statewide contests from 1992-2004 where Democrats stood. A test of the difference of mean vote by race of the candidate—for the overall vote and the Anglo vote share—shows that differences in the vote shares for Anglo, African-American, and Hispanic candidates are insignificant (F=.285 and .940, respectively). When one subjects the percentage of the Anglo vote captured by Democrats to a multivariate test, controlling for the race and ethnicity of the Democratic candidate and a temporal counter set to 0 in 1992 and increasing by a value of +1 for each passing year, the decline of the Anglo vote for Democrats is not significantly related to a candidate's ethnicity. African-American and Hispanic candidates fare no worse than Anglo Democrats. Indeed, the coefficients for black and Hispanics candidates are actually positive. *Bullock and Gaddie* at p. 14.

In sum, insufficient racial polarization exists in the Texas electorate to implicate the third prong of the *Gingles* test.

Appellants do not allege a lack of responsiveness by elected officials to minorities, a factor cited by the Judiciary Committee. It cannot be presumed that Republican elected officials are less concerned with minority needs than Democrats. NAACP Chairman Kweisi Mfume called for greater competition by both parties for the black vote, stating: "And yes, 34 years after the assassination of Dr. Martin Luther

King, we still have a society where some in the Democratic party take our vote for granted and some in the Republican party too often refuse to campaign for it." *See,* Mfume, Kweisi, *2002 NAACP Convention Address*, July 8, 2002.

Finally, Texas minorities do not suffer an "inequality in the opportunities to elect their preferred representatives." *Gingles*, 478 U.S. at 47. In Texas, the average minority voter lives in a congressional district with fewer registered and actual voters than the average Anglo voter. In part because districting is based on raw U.S. Census population data that includes children, illegal immigrants, and felons—all of whom are ineligible to vote—the average minority Texan actually casts a more heavily weighted vote than the average Anglo Texan. This should be considered in evaluating whether a particular redistricting plan disadvantages minorities.

In 2004, in the eight Texas majority-minority congressional districts, an average of 153,185 people voted for Congress. *See,* Texas Secretary of State, *2004 Election Results*, available at http://elections.sos.state.tx.us. In the remaining 24 congressional districts, an average of some 238,838 votes were cast for Congress. Accordingly, there were 56 percent more votes cast in the non majority-minority districts. Thus, voters in the majority-minority districts had their votes weighted at 1.56 while their counterparts were weighted at 1.00. Section 2 does not confer upon a group the right to proportional representation commensurate with the racial and ethnic makeup of the general population, but rather a guarantee of an equal opportunity to influence the political process that protects individual voters from dilution of their voting strength based on racial or ethnic background. The greater weight of Texas minorities' votes in congressional elections offsets any countervailing effects on minority influence attributable to redistricting.

E. Section 2 of the VRA Provides No Entitlement to the Creation or Maintenance of Minority-Influence Districts

Under Plan 1374C, there are at least as many majority-minority districts as under the 1991 gerrymander. Including District 9, which has a majority-minority population and a 48 percent black voting-age population, there is one more majority-minority district after 1374C. The redrawn District 9 elected black Democrat Al Green in place of white Democrat Chris Bell. Green praised the composition of the district, noting, "The 9th District is uniquely one of the most culturally rich and ethnically diverse districts in the country. With its large African-American, Hispanic-American, Asian-American, and immigrant population, the 9th Congressional District is a microcosm of the nation." *See*, http://www.house.gov/algreen/district.shtml.

Under Plan 1374C, there are eight majority Latino districts based on voting age population, five of which elect Hispanics and seven of which elect the Hispanic candidate of choice in general elections. *Bullock and Gaddie* at pp. 10-11. The only majority Latino district in which the Hispanic candidate of choice in the general election does not prevail is District 23, which elects Hispanic Republican Henry Bonilla with as much as 43.3 percent of the Hispanic vote. *Id.* at p. 19, citing Katz, Jonathan N., *Report on Texas Congressional Redistricting: Minority Opportunities and Partisan Fairness*, submitted in *Del Rio v. Perry*, 2001.). Counting District 23, some 25 percent of Texas' congressional districts are now majority Latino. Even if District 23 is excluded, the 21.8 percent of majority Latino districts is comparable to the 22.3 percent of the Texas voting age population that is Hispanic. *Bullock and Gaddie* at p. 15. Additionally, after Plan 1374C, Texas has three congressional districts occupied by African-Americans. Given that Texas has majority-minority districts for both blacks and Hispanics commensurate with their share

of the state's voting age population, there is no retrogression in the number of majority-minority districts.

Appellants therefore seek an unprecedented expansion in the scope of Article 2 that would create a judicial entitlement for white Democrats who rely on minority votes for their margin of victory to have their districts cryogenically preserved even as the electorate evolves through redistribution of population and the realignment of partisan identification. The panel properly concluded: "Plaintiffs' understandable efforts to freeze this 'coalition' by locating some duty under § 2 not to redraw the district is a transparent effort to use race as a shield from a partisan gerrymander when the district itself was a child of identical efforts to gerrymander." *Session v. Perry*, 298 F.Supp.2d 451, 481 (E.D. Tex. 2004). In many competitive districts around the country, minority voters constitute a sufficient portion of the electorate to sway the election if they vote entirely or predominantly for one candidate. Section 2 does not provide minorities in all of these districts a statutory right to always have their preferred candidate prevail, but simply guarantees an equal opportunity to vote. The Fourth Circuit so reasoned in rejecting such a claim:

> The argument that a coalition of black and white voters may claim that a redistricting plan dilutes their *combined* ability to elect candidates confuses the purpose of Section 2. The objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability 'to elect its candidate of choice on an equal basis with other voters.'" *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). . . . . Furthermore, any construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are

not so defined. *Hall v. Virginia*, 385 F.3d 421, 430-31 (4th Cir. 2004).

Appellants ignore important distinctions between minority-influence districts and majority-minority districts. Unlike majority-minority districts, in minority influence districts, minorities' true candidate of choice will often lose the primary or may not even run. By their nature, coalitional districts involve political horse-trading in the primary where varying factions must compromise. The three-judge redistricting panel in South Carolina concluded of minority-influence districts with minority populations of 25-40%: "With the aid of a substantial (but not majority) black population that votes nearly exclusively for a Democratic candidate, a white Democrat can usually defeat a black Democrat in the primary election and then use the black vote to defeat any Republican challenger in the general election." *Colleton County Council v. McConnell*, 201 F. Supp. 2d 618, 643, n. 22 (D.S.C. 2002). That court found drawing such districts "is, therefore, an inherently politically based policy" not mandated by the VRA. *Id.*

Appellants focus on District 24, even though it had only a 21.4 percent black voting age population and a 23 percent Hispanic citizen voting-age population, and no black candidate had ever filed against Congressman Frost in the Democratic primary. Blacks and Hispanics in District 24 have not exhibited the voting cohesion required by *Gingles* for them to be treated as a single minority group. The panel expressly so concluded, noting "there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections, where their allegiance is free of party affiliation." *Session v. Perry*, 298 F.Supp.2d 451, 478 (E.D. Tex. 2004). In the 1998 Democratic primary for Attorney General, black candidate Morris Overstreet garnered 74.3 percent of the black vote in District 24, but Hispanics and Anglos in the district voted overwhelmingly for his white opponent Jim Mattox. *See*, Lichtman Report, Def. Exh. 22.

The panel correctly concluded that "if § 2 protection is afforded to old District 24 despite the absence of the *Gingles* factors, the VRA begins to protect political affiliation and not race." *Session v. Perry*, 298 F.Supp.2d at 484.

Likewise, District 25, which was redrawn by Plan 1374C to become District 9 now represented by Congressman Al Green, did not perform for blacks under the 1991 gerrymander. In the 2002 Democratic primary, 69 percent of black voters chose former Houston City Councilman Carroll Robinson, an African-American, but Robinson lost to Anglo Chris Bell, as Bell received the bulk of white and Hispanic support. *See*, Lichtman Report, Table 17.

The Appellants contend Plan 1374C violates Section 2 by redrawing purported minority-influence districts in Central and East Texas, formerly districts 1, 2, 4, 9, 10, 11, and 17. They concede the State had no obligation to create these districts, but argue they should now be impregnable. The panel disagreed, noting none of them had a citizen voting age population of more than 22 percent of a single minority group and that, even if blacks and Hispanics were combined despite lack of cohesion, none of these districts approached majority-minority status. *Session v. Perry*, 298 F.Supp.2d at 485-86.

F. Section 2 Did Not Require Creation of Seventh Hispanic-Majority District

The panel properly concluded that the population figures do not require the creation of another Hispanic-majority district. Even if disputed District 23 is excluded, the 21.8 percent of majority Latino districts under Plan 1374C is comparable to the 22.3 percent of the Texas voting age population that is Hispanic. The panel determined: "The GI Forum Appellants have shown neither that seven districts can be drawn, meeting the threshold *Gingles* requirements, that have a majority of Hispanic citizen voting age population, nor that all such districts, if they could be drawn, would function effectively as Latino opportunity districts." *Session v. Perry*, 298 F.Supp.2d

at 496. The panel found that the map submitted by the Appellants envisaging a seventh district (1385C) required bizarre line-drawing that contravened traditional districting principles.

Furthermore, to squeeze in a seventh Hispanic-majority district, the panel observed that one of the seven districts would have had only a 50.3 percent Hispanic citizen voting age population with another at 56.9 percent. Democratic Congressman Rubén Hinojosa testified that "along the Texas border region from Brownsville to McAllen to Laredo to El Paso in order to win an election, you need to have about 57, 58% or higher Hispanic voter age population because of the low turnout." *Id.* at 495, n. 134. That Congressman Henry Bonilla's former District 23 did not elect Hispanics' candidate of choice is indicative of this point.

G. Redrawing of District 23 Did Not Constitute Retrogression in Violation of Section 2

The Appellants' claims concerning changes to District 23 must be rejected. First, District 23 was not electing the minority candidate of choice, although it did elect a Hispanic Republican. Second, the changes to District 23 were offset by the creation of majority-Hispanic District 25. While the Appellants ask this Court to examine District 23 in a vacuum, *Georgia v. Ashcroft* held otherwise with respect to a Section 5 claim:

> To determine the meaning of "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise," the statewide plan must first be examined as a whole: First, the diminution of a minority group's effective exercise of the electoral franchise violates § 5 only if the State cannot show that the gains in the plan as a whole offset the loss in a particular district. Second, all of the relevant circumstances must be examined, such as minority voters' ability to elect their candidate of choice, the extent of the minority group's opportunity to participate

> in the political process, and the feasibility of creating a nonretrogressive plan. *Georgia v. Ashcroft*, 539 U.S. 461,463-464 (2003).

Accordingly, Appellants are foreclosed from claiming the loss of a majority-minority district cannot be offset by creating one in another part of the state.

H. FACTS DO NOT SUPPORT *SHAW V. RENO* RACE-BASED GERRYMANDERING CLAIM

We agree that *Shaw* and the Equal Protection clause prohibit drawing district lines primarily based on race.[11] However, the panel correctly concluded that the facts here reveal no such impermissible use of race.

The panel properly relied on *Washington v. Davis*, 426 U.S. 229 (1976) and its progeny for the critically important principle that an adverse impact alone does not establish a racial discrimination claim without evidence of a discriminatory purpose. *Id.* at 642. The lower court also discussed *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977) in which this Court held that the denial of a zoning request was not unlawful unless it was motivated by a discriminatory purpose, even though it adversely affected minorities. *Id.* at 469-70. Finally, the panel drew from *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979) in which this Court ruled that a Massachusetts statute preferring veterans for civil service positions did not unlawfully discriminate against women because few women happened to qualify. The *Feeney* majority wrote:

> [I]t would thus be disingenuous to say that the adverse consequences of this legislation for women were

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[11] Amicus briefs urging this Court to the bizarrely-shaped, race-based districts at issue in *Shaw* were filed by Appellants or groups aligned with them: the Democratic National Committee, Lawyers' Committee for Civil Rights Under Law, and the NAACP Legal Defense and Educational Fund, Inc. We encourage former supporters of race-based public policies to embrace colorblind approaches, but the excessive use of race in redistricting is no more justifiable depending on which political party benefits.

> unintended, in the sense that they were not volitional or in the sense that they were not foreseeable, nevertheless, "discriminatory purpose" implies more than intent as volition or intent as awareness of consequences; it implies that the decision maker selected or reaffirmed a particular course of action at least in part "because of," not merely "in spite of," its adverse effects upon an identifiable group. . . . *Id.* at 257.

There is no constitutional or statutory basis for loosening this discriminatory purpose requirement. Whether it is the Fourteenth Amendment or the VRA, a guarantee of equal opportunity, not proportional results, is the touchstone of the plain language of these provisions. To be actionable, disproportionate results must be traceable to ongoing purposeful discrimination, or at the least, the present effects of past discrimination by the entity in question. *See, Podberesky v. Kirwan*, 956 F.2d 52, 57 (4th Cir.1992), cert. denied, 115 S.Ct. 2001 (1995)) (holding University of Maryland's scholarship program exclusively for blacks could not be sustained as a constitutionally permissible remedial measure absent sufficient showing of present effects of past discrimination by the University). Diluting the discriminatory purpose requirement would augur an avalanche of dubious litigation, as hypothetical Appellants could establish as a matter of law that the National Hockey League discriminates against blacks, Hispanics and Asians and that nursing schools unlawfully discriminate against men. The mere fact that all societal outcomes do not occur in exact proportion to the percentages of various minority groups in the population does not, taken alone, prove that a group was disfavored in the process.

Applying this sound body of law, the panel found the evidence showed race played no role in the drawers' decisions. They concluded that backers of Plan 1374C sought to advance Republican interests and any negative impact on minorities simply flowed from the fact that most minorities happen to be Democrats. For example, after thoroughly

reviewing the testimony of credible witnesses, the panel rejected Appellants' claim that minority voters were placed in District 26 instead of District 25 on the basis of race:

> [W]e find that including the large Democratic area of southeast Tarrant County in District 26 was the sole product of political give-and-take by legislative members over their own state districts and the effort to not create another Democratic district. The actions were not taken because of race; they were taken in spite of it. *Session v. Perry*, 298 F.Supp.2d at 4'/2.

The panel also found that "ethnicity did not predominate in the numerous decisions involved in the placement of the district lines in Congressional Districts 28, 15, 25, and 27." *Id.* at 490. The notion that Plan 1374C embodies a discriminatory purpose is belied by the fact that Vilma Luna, a Hispanic Democrat; Ron Wilson, a black Democrat[12]; and Elvira Reyna, a Hispanic Republican, all voted for it. *House vote on redistricting plan*, AUSTIN AMERICAN-STATESMAN, October 10, 2003. Not a single minority member of Congress was unseated as a result of Plan 1374C and not a single performing majority-minority district was eliminated.

Appellants seek to assign a racial purpose to the redrawing of District 23. However, the lower court found the redrawing of this district was motivated by mapmakers' desire to improve Congressman Bonilla's re-election prospects and that this required splitting Laredo and Webb County. *Session v. Perry*, 298 F.Supp.2d at 490. Given that all incumbent Republican Congressmen were protected and none were paired under Plan 1374C, neither Congressman Bonilla nor his district were treated differently based on race. In any event, the district was not performing as a minority-majority district. Consequently, Appellants' challenge to District 23 can neither succeed as a *Gingles* claim or a *Shaw* claim.

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[12] Wilson successfully led the fight to make Martin Luther King Jr. Day a state holiday. *See*, Nissimov, Ron, *Ron Wilson: a man of contradictions, controversy*, HOUSTON CHRONICLE, January 11, 2004.

While Appellants attempt to analogize District 23 to the districts at issue in *Shaw*, they are easily distinguishable. First, neither District 23 nor any other district in Plan 1374C is shaped nearly as bizarrely as the districts at issue in *Shaw*. Second, the two districts in *Shaw* resulted from revisions to a legislatively approved map that only occurred because North Carolina's Attorney General ordered that a second majority-minority district be created. Finally, throughout the *Shaw* litigation, the State did not dispute that the purpose of the two snake-shaped districts that ignored traditional districting principles was to divide voters based on race. Rather, the State asserted that their racial purpose was benign and, because the Appellants were white, they had no cognizable claim under the VRA.

CONCLUSION

This Court should not give partisans battling over their political fiefdoms more legal ammunition to use race as a weapon by opening another front in Section 2 litigation. Doing so would obliterate the clear statutory language, every applicable precedent, and the panel's carefully considered factual findings. To fill the void, Appellants ask this Court to erect a race-based house of cards from which politicians will deal more litigation from the bottom of the deck, using race as their ace in the hole to trump traditional districting principles. With its decisions in *Shaw v. Reno* and *Georgia v. Ashcroft*, this Court has wisely retreated from a rigid jurisprudence that has too often served as an enabling device for politicians to draw districts based first and foremost on race. Rather than injecting race further into redistricting by making so-called influence districts inviolate, the Court should continue to move away from formulaic race-based requirements and towards a jurisprudence that heeds the race-neutral vision that animated Section 2 and the Reconstruction Amendments and recognizes the remarkable progress that Texas and the nation have made towards achieving this noble goal.

Respectfully submitted,

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Nos. 05-204, 05-254, 05-276, 05-439

JAN 10 2006

OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

LEAGUE OF UNITED LATIN AMERICAN CITIZENS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees

TRAVIS COUNTY, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

EDDIE JACKSON, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

GI FORUM OF TEXAS, *et al.*,
Appellants,

v.

RICK PERRY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Texas

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BRIEF OF BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW AS *AMICUS CURIAE* SUPPORTING APPELLANTS

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INTERESTS OF THE *AMICUS CURIAE*

The Brennan Center unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. Our mission is to develop and implement an innovative, nonpartisan agenda of scholarship, public education, and legal action that promotes equality and human dignity, while safeguarding fundamental freedoms. Through the Voting and Representation Project, which is part of our Democracy Program, the Brennan Center seeks to protect the right to equal electoral access and full political participation. The Brennan Center takes an interest in this case because it implicates voters' ability to have a meaningful voice in their government in light of increasingly sophisticated gerrymandering techniques, and because it presents the specter of an escalating war of mid-decade "re-redistrictings" that will further undermine the responsiveness of representatives to those whom they purport to represent. The Brennan Center submitted briefs on related issues in *Vieth v. Jubelirer*, 541 U.S. 267 (2004), and *People ex rel. Salazar v. Davidson*, 79 P.3d 1221 (Colo. 2003), as well as a brief supporting an application for a stay the first time the current cases were appealed to this Court.[1]

SUMMARY OF ARGUMENT

Simply put, this case arises out of perhaps the most notorious, even scandalous, partisan gerrymanders of the past half century. This redistricting had no purpose other than partisan gerrymandering. No one even pretends to assert that it had any other purpose. It was pushed through the state legislature on entirely partisan grounds just two years after the last, constitutionally required reapportionment. This mid-decade

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[1] No party's counsel authored any part of this brief. No person or entity other than *amicus* and counsel contributed monetarily to preparing or submitting the brief. Letters from all parties' counsel consenting to the filing of this brief have been lodged herewith.

re-redistricting fails constitutional muster. If it does not fail, it is hard to imagine what would.

It fails even after the decision in *Vieth*. If the *Vieth* plurality and dissenters agreed on nothing else, they agreed on what the case was about. The author of the plurality opinion noted that eight of the nine Justices agreed that politics is a constitutional redistricting criterion "so long as it does not go too far." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting). The *Vieth* dissenters did not disagree; after all, two of them had opined that while *some* intent to gain political advantage was inevitable, "the issue is one of how much is too much." *Vieth*, 541 U.S. at 344 (Souter, J., dissenting).

How far is too far? How much is too much? Whatever the range of possible answers is, it is plain that 110% must be too much. That is the weight that one of the re-redistricting's architects assigned to political gain for Republicans when asked about the legislature's motives. *Session v. Perry*, 298 F. Supp. 2d 451, 473 (E.D. Tex.) (noting that "political gain for Republicans was 110% of the motivation for the Plan"), *vacated in five separate orders*, 125 Sup. Ct. 351-52 (2004). The state has contended, and the District Court found, that the re-redistricting was undertaken purely for political advantage. This Court need not decide whether 51%, or 75%, or 90% is too much; when the impermissible purpose of harming voters with disfavored viewpoints is not leavened with any legitimate state purpose, the state has violated the Constitution.

In many respects, this case is not a typical redistricting case of the sort considered by this Court several times in recent decades. It arises out of singular – and distinctly distressing – circumstances. Ordinary post-census redistricting, however partisan it may be, serves the nonpartisan state interest of replacing districts that would otherwise violate the "one person, one vote" guarantee. The mixture of motives

that attends decennial redistricting—partisanship, incumbent protection, eliminating mal-apportionment, and so on—may seem to complicate the formulation of "judicially manageable standards" for determining whether the resulting map is so badly skewed towards one faction as to violate the Constitution. *See Baker v. Carr*, 369 U.S. 186, 226 (1962). This case, accepting the District Court's findings (and the state's own contentions), involves no such mixed motives. It requires only a narrow, judicially manageable rule: state action that is admittedly and openly taken *solely* for partisan advantage is iliegal.

In short, 110% is too much.

ARGUMENT

I.
The Constitution Establishes a Representative Democracy Incompatible with State Action Designed to Disadvantage Citizens with Disfavored Political Opinions.

Representative democracy, protected by federalism and the separation of powers as well as by the Bill of Rights and later amendments, is the essence of the Constitution. Our foundational text, particularly as amended, enshrines two principles: the right of the people to participate as equals in the project of self-governance; and the necessity for representatives to be accountable to their electors. The Texas re-redistricting clashes with both of these principles.

A. Constitutional Structure.

The Court has attended to the Constitution's structure, as well as the text of specific clauses, in adjudicating the division of power both among the branches, *see, e.g., INS v. Chadha*, 462 U.S. 919, 946 (1983) ("The very structure of

the Articles delegating and separating powers under Arts. I, II, and III exemplifies the concept of separation of powers . . . ."); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 64 (1982) (plurality opinion) ("[T]he literal command of Art. III, assigning the judicial power of the United States to courts insulated from Legislative or Executive interference, must be interpreted in light of the . . . structural imperatives of the Constitution as a whole."), and between the federal and state governments, *see, e.g., Alden v. Maine*, 527 U.S. 706, 728 (1999) ("[S]overeign immunity derives not from the Eleventh Amendment but from the structure of the original Constitution itself."); *Fed. Maritime Comm'n v. S. Car. State Ports Auth.*, 535 U.S. 743, 754 (2002) (applying "the sovereign immunity embedded in our constitutional structure").

The most fundamental division of power in our democracy—between the government as a whole and the people from whom it derives all legitimate authority—similarly suffuses the Constitution. *See Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) ("[V]oting is of the most fundamental significance under our constitutional structure."). The Framers included in the text numerous structural elements to give effect to the popular will. *See, e.g.*, U.S. Const. art. IV, § 4 (guaranteeing states a republican form of government); art. I, § 2, cl. 1 (requiring periodic election of House members by "the people"); art. I, § 2, cl. 3 (providing for decennial enumeration and establishing minimum population of House districts); art. 1, § 2, cl. 4 (requiring House vacancies to be filled by elections, not appointments).

Not only the original Framers, but those who have followed, have focused their attention on preserving democratic self-governance. Of the 17 amendments adopted after the Bill of Rights, 12 deal with the democratic process or the government's accountability to the people. The Fourteenth

Amendment establishes national citizenship, requires states to provide equal protection of the laws (including voting districts of equal population), and conditions states' representation in Congress on their granting suffrage to newly freed slaves. The Fifteenth, Seventeenth, Nineteenth, Twenty-Third, Twenty-Fourth, and Twenty-Sixth Amendments implement equal universal suffrage by banning voting discrimination on the basis of race, sex, wealth, or youth; provide for direct popular election of Senators; and permit residents of the District of Columbia to participate in presidential elections. The Twelfth, Twentieth, Twenty-Second, and Twenty-Fifth Amendments provide for separate elections of the President and Vice-President, limit a lame-duck President's term, impose a two-term limit on the Presidency, and provide for orderly succession in time of Presidential disability. The Twenty-Seventh Amendment enforces accountability by forbidding Members of Congress from enjoying self-enacted pay raises without first standing for re-election.

Thus, the Constitution views every American citizen as a member of a self-governing community of political equals. In pursuit of that vision, it guarantees to each citizen the right to participate in democracy through voting, running for office, and fair representation. It also guarantees that the government will remain accountable to the people. It is this normative vision of representative democracy that underlies *Baker* and *Kramer v. Union Free School District*, 395 U.S. 621 (1969). It is this vision that is desecrated when a state openly, admittedly, and intentionally deprives citizens who have expressed disfavored viewpoints from participating as political equals in our representative democracy.

One would think that the principle of state neutrality among citizens of different political persuasions ought to be uncontroversial.

> If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.

Vieth, 541 U.S. at 312 (Kennedy, J., concurring in the judgment). The question should therefore be, not whether the Constitution permits a state to do what the Texas legislature set out to do, for surely it does not. The question is whether by acting in accordance with Justice Kennedy's hypothesized enactment but without adopting the enactment itself, a state can get away with its constitutional violation because courts cannot define a judicially enforceable rule giving effect to the Constitution's command. For, as Justice Kennedy went on to point out, pursuing the same outcome by different means does not render the impermissible permissible. At most, it makes the violation irremediable:

> If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive.

Id.[2] While four Justices concluded in *Vieth* that no judicially manageable standard could be crafted in the context of regular decennial redistricting (a conclusion with which we respectfully disagree), that problem does not affect this case, for reasons discussed in Point III below. Whatever the difficulties in other contexts, this particular assault on our constitutional structure can be averted by the judiciary.

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[2] Justice Kennedy's description might be applied to the Democratic gerrymander of Georgia, which was struck down because the party in power did not quite manage to act "still in accord with one-person, one-vote principles." *See Cox*, 542 U.S. 947.